

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

## Advice Memorandum

DATE: February 19, 2004

TO : Rosemary Pye, Regional Director  
Region 1

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: Shaw's Supermarkets, Inc.  
Cases 1-CA-41019

506-6090-1200  
530-4825-5050-0000  
530-4850-7550-0000  
530-8090-8300  
530-8090-9000

This case was submitted for advice on whether the Employer,<sup>1</sup> which operates unionized "Shaw's Supermarkets" and nonunion "Star Markets," violated the Act when it opened two new stores as Star Markets after taking actions in furtherance of opening them as Shaw's, which would have been subject to a contractual after-acquired clause, to avoid being subject to that clause. We conclude that because the Employer had no duty to bargain about the decision of under what name to operate a new store, and because the Employer did not discriminate against employees or interfere with their Section 7 rights, the Employer did not violate the Act by deciding to name and operate the stores as "Stars" before they opened.

### FACTS

The United Food and Commercial Workers Union, Local 791, AFL-CIO (Union) represents a unit of employees at Shaw's Supermarkets at several facilities throughout Southern Massachusetts and Rhode Island. The most recent collective bargaining agreement, effective July 28, 2001 to July 3, 2004, covers about 39 stores and 7,000 bargaining unit members.

Beginning in 1988, the Employer allowed the Union to set up a table in the interviewing room at new Shaw's stores and to speak to new employees. The Employer also agreed to remain neutral toward the Union and to recognize the Union if it obtained majority status at the new stores.

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<sup>1</sup> The Union has charged that the "Employer" is Shaw's Supermarkets. Parent company Sainsbury, however, appears to own both Shaw's Supermarkets and Star Markets. For purposes of this Advice memorandum, it is not significant whether the "Employer" is Shaw's or Sainsbury.

In 1989, the Union and the Employer codified this agreement in an access, neutrality, and contingent recognitional after-acquired clause,<sup>2</sup> which provided that the Employer will recognize the Union for Shaw's stores and warehouses acquired "presently, or hereafter" under the following conditions:

New Stores: When the Employer opens a new store within the geographical area described in Article I, the employer will allow access within the store prior to opening during the hiring process, will remain neutral, and will recognize the union and apply the contract when a majority of employees have authorized the union to represent them.

Since 1989, the Employer has opened at least 16 Shaw's stores in the geographical area covered by the Agreement, all of which were covered by the Agreement's after-acquired clause.

In 1999, the Employer's parent company, Sainsbury, purchased the Star Market chain, 44 nonunion stores in the same geographic area that the Union does not dispute were outside of the Shaw's bargaining unit. It also does not appear that the Union has disputed Sainsbury's ability to open new Star Market stores. Star Market, instead of remaining neutral regarding unions, presents orientation tapes with anti-union messages.

In the fall of 2001, the Employer "rebadged" a store in Falmouth, Massachusetts, from a Star Market to a Shaw's Supermarket. An existing Star was closed and a more expansive Shaw's was opened in the same shopping area. The Union viewed the new store as being covered by the after-acquired clause, like any other new Shaw's store, and sought to organize the facility. The Employer refused to grant access to the Union or to otherwise apply the terms of the after-acquired clause, claiming that the after-acquired clause only applied to newly constructed stores, not to rebadged former Star stores. The Union filed a grievance, arguing that once the Employer opened the store as a Shaw's, it was subject to the after-acquired clause. The Union did not contend that Star Markets are covered by the contract's after-acquired clause.

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<sup>2</sup> See Kroger Co., 219 NLRB 338 (1975).

On May 3, 2003, an arbitrator ruled in favor of the Union, finding that once the store opened as a Shaw's, it was a new store within the geographical area described in the collective bargaining agreement. The arbitrator noted that if the Employer had continued to operate the store as a Star Market, the collective bargaining agreement was not implicated. "As the Company progressively transitioned the acquired stores into a unified Shaw's structure, arguably they became Shaw's stores, although the Union has not pressed this somewhat metaphysical point. Once the stores are rebadged, however, they are unequivocally Shaw's stores." Thus, as of the date of the Falmouth store's opening, the new "Shaw's" was subject to the after-acquired clause.

With regard to the two stores at issue here, one in Marshfield and one in Harwich, Massachusetts, the parties agree and public documents confirm that the Employer had intended as early as 2001 to open them as new Shaw's stores. Like the Falmouth store, both stores had originally been Stars that the Employer was reburbing into larger markets.

Before the stores had opened for business, the Union learned that the Employer would be hiring at the Marshfield store on May 12, 2003. Two Union agents visited the Marshfield hiring area, located a short distance from where the new store was being built, to take place in the interviewing process pursuant to the after-acquired clause. After initially asking the Union agents to leave, the Employer's human resources director, Michael Hennessey, allowed the agents to stay, informing the agents that the Employer was simply passing out applications that day. The applications stated that employees would be working for "Shaw's" and the sign in front said "Shaw's/Star." A few days later, a sandwich board was placed in front of the hiring facility that stated "Star Market now hiring."

At some point in May, before the stores opened, the Employer decided to change the name of the two stores from Shaw's to Star. The Employer made its decision within weeks of the arbitrator's decision, where it learned that stores "rebadged" from Star to Shaw's were covered under the contract's after-acquired clause.

The Union sat in on the interviewing process at the Marshfield hiring location for about two weeks. In late May, however, the Employer moved the hiring site to a vacant store next to where the new store would be opening and refused to allow the Union agents inside. A few days later, the Employer informed the Union that the Marshfield store

would be opened as a Star Market and that there was thus no reason for the Union agent to be there.

Union president Russ Regan called the Employer's attorney, Eric Nadworny, around the end of May, and was informed that the stores in Marshfield and Harwich would be opened as Star Markets. In early June, the Employer asked a Union agent sent to the Harwich store to leave. In late June, the Harwich store opened as a Star Market. To date, the Employer has not allowed the Union the benefits of the after-acquired clause at either the Harwich or Marshfield Star Markets.

The Union filed charges alleging that the Employer's conduct violated Section 8(a)(5) and (3) of the Act. The Employer claims its decision to rename the stores was based in part on market research on the name "Star," indicating customer preference for the name. The Employer further argues that, even if it was attempting to avoid the after-acquired clause, it did not violate the Act by doing so. The Region's investigation indicates that some of the Employer's market research was not conducted until after the Employer decided to rename the stores.

After the case was submitted to Advice, the Union amended the charge to allege that the Employer changed the name of the stores to that of "its Alter Ego, 'Star Market,'" in an attempt to deny employees the benefits of the collective bargaining agreement.

#### **ACTION**

We conclude that, absent withdrawal, the charge should be dismissed. While the Employer may have changed the name of the stores from Shaw's to Star before they opened to avoid triggering the after-acquired clause, the Employer did not violate the Act because there is no basis to conclude that the Employer had a duty to bargain over the decision of what to name a new store before it opens. In addition, the Employer's actions did not discriminate against any new employees or Shaw's unit employees, nor did it interfere with their Section 7 rights.

**a. Section 8(a)(5) allegation.**

Initially, an employer generally has an obligation to bargain with a union about managerial decisions that are based on labor costs.<sup>3</sup> Those cases have arisen in the context of an employer's decision to subcontract existing bargaining unit work<sup>4</sup> or to relocate a plant.<sup>5</sup> Thus, the employers in those cases were directly impacting the unionized employees' bargaining unit work. The decisions to subcontract unit work or to partially close a unit plant for labor cost reasons clearly affect terms and conditions of employment over which an employer has a duty to bargain under Section 8(a)(5).

Here, by contrast, the decision of what to name a new store does not impact the existing Shaw's bargaining unit employees' terms and conditions of employment because it will not cause them to lose work or otherwise impact their employment. Rather than moving existing unit work, the Employer is opening a new store with a new labor force that has never been covered by the collective bargaining agreement. No authority requires that an employer bargain with the union at a represented plant over a decision to open new plants with new capital and a new workforce.

The Union appears to claim that the Employer's decision here denied the Shaw's unit employees their rights under the after-acquired clause. Those rights, however, only attach once the Employer has "opened" a new Shaw's. The collective bargaining agreement provision at issue here provides that "when the Employer opens a new store" within the described geographical area, the employer will allow access, will remain neutral, and will "apply the contract when a majority of employees have authorized the union to represent them." While the clause is somewhat ambiguous as to when it comes into effect because it provides for access and neutrality even before a new store opens, the plain opening language of the after-acquired clause provides that the Union's rights do not ripen until the Employer "opens" a new Shaw's store. Because the Employer here never "opened" new Shaw's stores,

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<sup>3</sup> See, e.g., First National Maintenance Corp. v. NLRB, 452 U.S. 666, 679 (1981); Ferragon Corp., 318 NLRB 359, 362 (1995).

<sup>4</sup> See, e.g., Equitable Resources Exploration, 307 NLRB 730, 732-33 fn. 11 (1992), *enfd.* 989 F.2d 492 (4<sup>th</sup> Cir. 1993).

<sup>5</sup> See, e.g., Central Transport, Inc., 306 NLRB 166, 166-67 (1992), *enfd.* in rel. part 997 F.2d 1180 (7<sup>th</sup> Cir. 1993).

we cannot find that the Employer violated its duty to bargain with the Union. Essentially, the bargaining unit employees held an inchoate right to the benefits of the after-acquired clause. While determining when the Union's rights under the after-acquired clause attach raises a difficult and novel question, we cannot find that those rights exist where the Union permits the Employer to run Star Markets nonunion and where the plain language of the after-acquired clause indicates that clause applies only when a new Shaw's opens.

The arbitrator in the Falmouth case also recognized the difficulty of determining when the Unions' rights under the after-acquired clause attach: "As the Company progressively transitioned the acquired stores into a unified Shaw's structure, arguably they became Shaw's stores, although the Union has not pressed this somewhat metaphysical point." The arbitrator went on to find that once the Falmouth store had opened as a Shaw's, a "new store" subject to the after-acquired clause had unequivocally opened. Here, we believe that where the store never in fact opened as a Shaw's, it did not become a Shaw's and, thus, did not become subject to the after-acquired clause. At the least, this interpretation of the contract is equally as plausible as finding that the stores became Shaw's subject to the after-acquired clause at some earlier point in time.<sup>6</sup>

We note that while the Union amended the charge to allege that Star was Shaw's "alter ego," the Union does not argue that the Employer is running an unlawful double-breasting operation by operating the Star Markets on a nonunion basis. In fact, the Union has permitted the parent company, Sainsbury, to run Star Markets and to open new Star Markets as nonunion operations. Further, the Union does not allege that the factors controlling alter ego status – common ownership and financial control, common management, interrelation of operations, and integrated control of labor management<sup>7</sup> – are different at the newly opened Star Markets in Harwich and Marshfield than at other Star Market stores. Unless the Union alleges that Star and Shaw's are alter egos for all purposes such that the employees at all stores should be considered as a single unit, or that the Harwich and Marshfield stores are being operated differently than

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<sup>6</sup> See NCR Corp., 271 NLRB 1212, 1213 (1984) (where Board is faced with two "equally plausible contract interpretations, Board will not enter dispute to serve function of arbitrator in determining which party's interpretation is correct).

<sup>7</sup> See Radio & Television Broadcast Technicians v. Broadcast Service of Mobile, Inc., 380 U.S. 255, 256 (1965).

other Star Markets, which are not alter egos of Shaw's, the Union's amended charge does not affect our analysis.

**b. Section 8(a)(3) allegation.<sup>8</sup>**

We also find no Section 8(a)(3) violation because no unionized Shaw's employees were discriminated against in regard to hire, tenure, or terms or conditions of employment.

In Joseph Magnin,<sup>9</sup> the Board held that an employer violated Section 8(a)(3) by refusing to transfer unionized employees to a new location subject to an after-acquired clause in order to prevent the union from gaining a majority showing, which would have obligated the employer to incorporate the new location into the bargaining unit. In that case, however, a new store opened that was unambiguously subject to the after-acquired clause, and the employer discriminated against unionized employees in refusing to hire them.<sup>10</sup> Here, a Shaw's market subject to the after-acquired clause never opened, and there is no allegation that the Employer discriminated against Shaw's unit employees or other Union-represented employees by refusing to hire them at the newly opened Star Markets.

The Union may argue that the employees were discriminated against because the Employer acted in order to deny the Shaw's unit employees the benefits of the collective bargaining agreement. But the employees' benefits under the agreement only matured when the Employer "opened" a Shaw's store. As discussed above, where the Union and the Employer have essentially agreed to permit Sainsbury to run a double-breasted operation, and there is no showing that the Employer has a duty to bargain over what to name a new store, we find no discrimination against the unit employees in their terms and conditions of employment.

**c. Section 8(a)(1) allegation.**

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<sup>8</sup> While a possible Section 8(a)(3) violation was not submitted to Advice, we note that this violation is alleged in the charge, and, therefore, we considered it.

<sup>9</sup> 257 NLRB 656, 657 (1981), enfd. 704 F.2d 1457 (9<sup>th</sup> Cir. 1983), cert. denied 465 U.S. 1012 (1984).

<sup>10</sup> See also Alpha Beta Co., 294 NLRB 228, 228 (1989) (employer violated Section 8(a)(3) where employer refused to transfer employees from a store that was closing to a new store subject to an after-acquired clause).

We also considered whether the Employer's renaming of the stores from Shaw's to Star before they opened interfered with employees' Section 7 rights. We are unable to find such interference.

First, the decision to change the name of the stores does not impinge upon the Section 7 rights of the new Star employees. Thus, the new employees have no rights under the Shaw's collective bargaining agreement, which does not cover them.<sup>11</sup> While the Employer's actions may have been designed to make it less likely that the new Star employees would choose Union representation, the decision does not interfere with their rights to self-organization, to join a labor organization, or to engage in any other concerted activity. Thus, we find that the decision to rename the store did not interfere with their Section 7 rights.

Second, while not raised in the submission, we also considered whether the Employer's decision to rename the stores interfered with the Shaw's unit employees' Section 7 rights. In NLRB v. City Disposal Systems, Inc.,<sup>12</sup> the U.S. Supreme Court held that an employee's invocation of a right grounded in a collective bargaining agreement was concerted activity protected by Section 7. Thus, an employer violates Section 8(a)(1) if it interferes with an employee's invocation of rights provided for in a collective bargaining agreement.<sup>13</sup> We are unable to find such interference here, however, where the collective bargaining agreement provisions at issue—access, neutrality, and the right to have the Union represent new Shaw's employees upon majority showing—are inchoate until the Employer opens new Shaw's stores. Where the collective bargaining agreement's rights had not ripened, we are unable to find that the Employer's decision has interfered with Section 7 rights.

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<sup>11</sup> See Joseph Magnin, 257 NLRB at 657 (in after-acquired clause situation, employer's duty to recognize union as representative of new store employees and to apply collective bargaining agreement occurs only if union presents evidence of majority support).

<sup>12</sup> 465 U.S. 822, 832-33 (1984).

<sup>13</sup> Id. at 833 fn. 10.

Accordingly, absent withdrawal, the complaint should be dismissed.

B.J.K.